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ABSTRACT

In this speech the question of whether the federal government is holding itself to the same civil rights standards it enforces in the private and public sector is addressed. Problem areas upon which the Carter administration is focusing are examined. These areas include the failure to eliminate discrimination against federal employees, the failure to ensure that Federal funds are not used in a discriminatory manner, and the failure to revise Federal laws and regulations which are sex biased. A number of court cases which have been brought against the government are mentioned and their legislative outcomes reviewed. Changes in policy and practice being implemented to correct previous federal laxities are described. Some bureaucratic, technical, and attitudinal problems which have made compliance with and enforcement of civil rights legislation difficult are discussed. Ways in which the current administration is addressing these problems are outlined. Optimistic conclusions are drawn about the commitment of the federal government to abolish discrimination on the basis of race or sex. (GC)

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Department of Justice

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SPEECH

BY

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BEFORE THE

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
CHICAGO, ILLINOIS

ON

OCTOBER 19, 1977

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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WHY NOT THE FAIREST?

The Legal Defense Fund and the Department of Justice seem to share a number of defendants in litigation designed to vindicate civil rights in America. In fact, when I was appointed by President Carter, I had to disqualify myself in over forty cases in which the Civil Rights Division and LDF were representing the interests of black plaintiffs. But there is one defendant we do not have in common: The federal government. It is about this violator of civil rights that I would like to talk tonight. Posed simply, the question I want to raise is this: "Is the federal government holding itself to the same civil rights standards it enforces in the private and public sectors?"

The federal government is one of the largest employers in the nation; federally-assisted programs receive billions of dollars each year; and countless federal laws and regulations affect every citizen's life. Therefore, it has the highest responsibility to ensure that equal opportunity laws applicable to federal employees and funding programs are enforced in an effective manner.

There was a time when the federal government was looked to as a leader in implementing equal opportunity guarantees. Then with passage of the new civil rights laws in the 1960's, the focus of our efforts was naturally directed outward to the systemic problems of state and private discrimination. The irony is that while the federal government was placing tremendous pressure on the non-federal sector

to comply with federal civil rights requirements, efforts and resources directed toward resolving similar problems "at home" may have been inadequate.

I want to focus on three problem areas in the federal sector which the Carter Administration considers to be primary targets for improvement and the efforts already being made to correct them. They are:

1) failure to eliminate discrimination against federal employees
2) failure to ensure that federal funds are not used in discriminatory manner
3) failure to revise federal laws and regulations which have proven to be sexually-biased.

In 1972 Congress extended the protections of Title VII of the 1964 Civil Rights Act to federal job applicants and employees in the executive agencies, military departments, and in competitive job positions in the legislative and judicial branches. Section 717 of the 1972 Equal Employment Opportunity Amendments provides that "All personnel actions affecting such persons" must be free from any discrimination based on race, color, religion, sex or national origin.

If the Civil Rights Division were to review federal employee statistics as we do in the average Title VII investigation of state and local government employers, suspicions of systemic racial and sex discrimination would be immediately aroused. For instance, there

is a total federal work-force of 1.4 million general schedule (GS) ("white collar") employees in the executive agencies. 43 percent are female, 13 percent black and 2.6 percent hispanic. However, when one looks at the grade levels of these groups, the distribution of women and minorities differs considerably from their representation in the total work-force. Whereas only 51 percent of all white collar federal employees are in grades 1-8, 81 percent of the women, 76 percent of the blacks and 66 percent of the spanish-surnamed employees are concentrated in those grades. Comparing these statistics to the upper GS-Grade range, (GS 13-15), we find only 1.8 percent of the women, 4 percent of the blacks and 6 percent of the hispanics in those grades, whereas 14 percent of the total work-force hold GS 13-15 positions.

Between 1972, when Title VII became applicable to the federal government, and 1976, the government was rightfully accused of "working both sides of the street" with respect to Title VII legal standards. While pursuing a vigorous enforcement policy as plaintiff, as defendant we set up a series of inconsistent defenses in Title VII suits filed by federal employees against executive agencies. For instance, as defendants, we argued that federal employees were not entitled to a trial de novo in federal court; that all members of a class must have exhausted their administrative remedies prior to filing suit; that federal employees had a greater burden of proof to justify back pay awards; and that retaliation against a federal employee for filing a charge of discrimination was <u>not</u> unlawful under Title VII. This

last defense was based on a technical construction of the statute rather than its spirit, and was ultimately struck down by the courts.

On August 31, 1977, Attorney General Bell issued a memorandum for all U.S. Attorneys and agency general counsels putting them on notice that in the future the Department of Justice will take the same position in interpreting Title VII in defense of federal employee cases as it has taken or will take in private or state and local employee cases. Judge Bell stated, ". . . /A/s a matter of policy, the federal government should be willing to assume for its own agencies no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon others." In conjunction with this new policy, the U.S. Attorneys' practice manual on Title VII is undergoing a thorough revision. Thus, a review of the merits of each case rather than an automatic raising of technical defenses will be the focus of our litigation efforts.

Turning to the administrative complaint and adjudication process, we find some more rather disturbing statistics.

The Civil Service Commission reports that in 1976 over 7,000 formal complaints of discrimination were made by federal employees, about half on racial grounds and another 22 percent on sexual grounds. The complaint alleged denial of promotion on the basis of discrimination. Nearly 4,000 investigations and over 1,000 hearings were conducted by the Civil Service Commission in 1976 resulting in approximately

300 findings of discrimination.

Civil Service Commissioner Campbell has been taking an active role in a review of the EEO complaint process, federal affirmative action programs and other civil service procedures by the "Federal Personnel Management Project." He is also examining the impact of the veteran's preference system on female employment in the civil service. A major issue on the reorganization agenda is finding a structure that will accommodate the two often conflicting interests of the CSC - as employer and as protector of the employees' rights.

Within the Justice Department, we are doing what we can to ensure that no women or minorities are denied equal employment opportunity. The statistical pattern we found in January was less than impressive. As of December 1976, females constituted only 11.5 percent of all Department attorneys. At policy making levels, there were only three women out of a total of 417. Minority attorneys were only 4.0 percent of the entire Department staff; five minorities were in policy-making positions. In May of this year, the Department created an Employment Review Committee charged first with reviewing the files of minority and female attorneys in grade beyond the requisite time who had not been promoted to determine whether discrimination was responsible for the lack of promotion. Secondly, it is authorized to review for a two-year period all proposed employment of attorneys and all promotions of attorneys to GS-13 or above (GS-11 is the normal entry level for attorneys). Contrary to reports published shortly

after its creation, the Committee was not established to prevent white male attorneys from being hired or promoted for two years. But it is a serious effort, chaired by Assistant Attorney General Barbara Babcock, head of the Civil Division, and myself to ensure that everyone in the Department gives more than lip-service to affirmative action. I am certain that we will be able to point with pride to a markedly improved pattern by January, 1978.

Title VI is the major statute requiring federal agencies to prevent and eliminate discrimination in federally-assisted programs. Title VI is limited to prohibition of racial and ethnic discrimination, but other special statutes of similar nature cover sex discrimination, e.g., the Revenue Sharing Act and the 1968 Crime Control Act, which authorizes funding by LEAA to law enforcement agencies.

A major problem in the Title VI area has been the historic lack of coordination of federal compliance efforts. Although the Attorney General was assigned a coordination role by executive order, until recently he had minimal "clout" to effect consistent policies.

Throughout the agencies, Title VI responsibilities often were relegated to an undermanned and poorly funded staff which was given ineffective or no training, thereby resulting in ineffective compliance reviews of recipients of federal funds.

A recent survey of agencies with Title VI responsibilities indicates that although they dispense over 80 billion dollars in federal assistance, and spend $40,000,000 to enforce Title VI, only

92 fund termination proceedings have been conducted in the past five years; eighty-six of those proceedings were brought by HEW against local school districts.

Nor have agencies made effective use of their authority to refer matters to the Department of Justice for litigation when voluntary compliance efforts have failed. Another problem has been that for those referrals we did receive, it was frequently necessary to re-investigate because field compliance investigators were inadequately trained in fact-finding and the law.

Evaluating the federal government's Title VI responsibilities from another angle, private plaintiffs have sued federal agencies on numerous occasions, charging inadequate enforcement of Title VI or actual complicity in discriminatory practices. One of the landmark cases of this nature was the Gautreaux case in which HUD was found to have violated Title VI and the Constitution by knowingly sanctioning and assisting the Chicago Housing Authority's racially discriminatory site and tenant selection practices with respect to the Public Housing Program. Another is LDF's Adams litigation alleging failures by HEW to enforce Title VI in the school desegregation area.

In the past year, a number of significant policy changes have been implemented which should greatly improve the federal government's enforcement of Title VI and related statutory provisions.

With respect to Justice's coordination role, President Carter issued a memorandum on July 20, 1977 to the heads of all executive

departments and agencies firmly committing this Administration to Title VI enforcement. The memorandum directs agency heads to exert firm leadership in this regard and to insist that their staffs cooperate fully with Department of Justice staff in developing strong and consistent enforcement procedures. The President stated there:

> Title VI of the Civil Rights Act of 1964 writes into law a concept which is basic to our country -- that the government of all the people should not discriminate on the grounds of race, color or national origin. There are no exceptions to this rule; no matter how important a program, no matter how urgent the goals, they do not excuse violating any of our laws -- including the laws against discrimination.

In late 1976, the Department of Justice issued detailed regulations to provide guidance to agencies enforcing Title VI. We also publish a quarterly Title VI newsletter which provides agencies with up-to-date information on policy changes and significant events.

Last month (September 26-29, 1977), the Civil Rights Division held a Title VI Conference in Washington which offered workshops on various facets of the enforcement process. New Title VI practice manuals were distributed to the participants for the purpose of improving the consistency of enforcement procedures among the numerous Title VI agency or offices.

The Civil Rights Division also is in the process of surveying each Title VI agency to evaluate its compliance efforts. Our findings are then published and we work with the individual agency to eradicate any deficiencies.

Various amendments enacted by Congress to "Title VI - like" legislation are also providing us with increased enforcement powers. For example, in suits brought by the United States for discriminatory use of LEAA funds, termination of funds will occur automatically within 45-days of filing unless otherwise directed by the court. In addition, Title VI litigation brought by the Justice Department under the revenue-sharing statutes should be strengthened as a result of a new agreement with the FBI to investigate alleged violations.

If the manner in which HUD handled the Gautreaux case is symbolic of old federal government ways, the Resident Advisory Board case in Philadelphia represents, in my estimation, a new sensitivity to our civil rights responsibilities. In November, 1976, a trial court found Philadelphia and HUD officials guilty of Fair Housing Act violations. In early January, HUD officials urged Justice to appeal that ruling. After consulting in February with newly-confirmed Secretary Harris, HUD withdrew its request. Instead, HUD subsequently filed a friend-of-the-court brief in the case on behalf of black plaintiffs urging an affirmance. The court of appeals recently affirmed.

A final problem area with respect to the federal government's law enforcement responsibilities concerns the existence of miscellaneous archaic and stereotyped statutes and regulations which result in unequal treatment or benefits on the basis of sex. Some of the

major U.S. Code titles in need of reform deal with the military, taxation and social security benefits.

The previous Administration recognized these problems and directed the Justice Department (in 1976) to devise a comprehensive plan to identify and revise discriminatory provisions. A central purpose behind this effort was to speed up the remedial process in advance of final ratification of the ERA. A Sex Discrimination Task Force was created in the Civil Rights Division a year ago to begin the review process. It was funded, however, only in April of this year at the request of the Carter Administration. The Task Force has a Director and a start-up staff that will shortly reach about 24. We anticipate that its work will not be completed until 1980.

In expressing his support for the work of the Task Force, President Carter stated:

> "Federal law should be a model of non-discrimination for every state and for the rest of the world. The federal government which is actively involved in eliminating sex discrimination in many areas, should not be upholding it in others."

In addition to proposing revisions of statutes containing sex-stereotyped terminology and presumptions, the Task Force is concentrating on several areas where major reforms are needed -- such as social security as noted above. As recommendations are completed, they will be submitted to the Congress for consideration.

The federal government has a long way to go before it gets out of the business of being a defendant in civil rights cases. But I think the changes I have just described in the areas of employment, federal funding and sex discrimination are strong evidence that this Administration is firmly committed to re-establishing the federal government as the leader in civil rights compliance. We are committed because it is right and because it is absolutely necessary if we are to enjoy any further success in our efforts to end discrimination elsewhere in our nation.

We do not think it unreasonable at all to ask of the federal government, to borrow a favorite locution of President Carter:

"WHY NOT THE FAIREST"